Office-Supreme Court, U.S.
FILED
SEP 16 1966
JOHN F. DAVIS, CLERK

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 367

G. C. COOPER, BERNARD COOPER, and
ELIZABETH MAULDING, NEE COOPER,
Petitioners,

VERSUS.

THE CITY OF OKLAHOMA CITY, a Municipal Corporation,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

BRIEF FOR RESPONDENT IN OPPOSITION

JAMES G. HAMILL
309 Municipal Building
Oklahoma City, Oklahoma 73102
Counsel for Respondent

September, 1966

UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. CE 5-0030

INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement	3
Argument	6
I. There Is No Important Question of Federal Law	7
II. Petitioners Have Waived Their Right to Urge a Federal Question	9
III. The Decision Is Clearly Correct	12
IV. There Is No Conflict of Decision	15
Conclusion	16

AUTHORITIES

Cases:

Beck v. Washington, 369 U.S. 541, 8 L.Ed. 98, 82 S.Ct. 955	10
Bilby v. Stewart, 55 Okla. 767, 153 Pac. 1173, on appeal, 246 U.S. 255, 62 L.Ed. 701, 38 S.Ct. 264	11
Burke v. Oklahoma City, Okla., 350 P.2d 264	3
Bush v. Oklahoma City, 194 Okla. 504, 154 P.2d 960	3, 4, 13
Consolidated Turnpike Company v. Norfolk & Ocean View Railway Company, 228 U.S. 326, 57 L.Ed. 857, 33 S.Ct. 510	8, 10

INDEX CONTINUED

PAGE

Escobedo v. Illinois (erroneously cited as Escobedo v. United States), 378 U.S. 478, 12 L.Ed.2d 977, 84 S.Ct. 1758 15

Fischer v. Oklahoma City, 198 Okla. 22, 174 P.2d 244 ..... 6, 16

Goodrich v. Detroit, 184 U.S. 432, 46 L.Ed. 627, 22 S.Ct. 397 15

Graham v. City of Duncan, Okla., 354 P.2d 458 16

Haggard v. Oklahoma City, 203 Okla. 76, 218 P.2d 366 3

Henry v. United States, 46 F.2d 640 ..... 6, 13

Hooker v. City of Los Angeles, 188 U.S. 314, 47 L.Ed. 487, 23 S.Ct. 395 9

Huling v. Kaw Valley Railway & Improvement Company, 130 U.S. 559, 32 L.Ed. 1045, 9 S.Ct. 603 15

Nichols v. Oklahoma City, 195 Okla. 305, 157 P.2d 174 3

Shepperd v. Maxwell, — U.S. —, 16 L.Ed.2d 600, 86 S.Ct. — 15

Southwestern Bell Telephone Company v. State of Oklahoma, 303 U.S. 206, 82 L.Ed. 751, 58 S.Ct. 528 8

St. Louis & San Francisco Railroad Company v. Shepherd, 40 Okla. 589, 139 Pac. 833, on appeal, 240 U.S. 240, 60 L.Ed. 622, 36 S.Ct. 274 11

Ward v. Board of County Commissioners of Love County, Oklahoma, 253 U.S. 17, 64 L.Ed. 751, 40 S.Ct. 419 8

White v. City of Pawhuska, 130 Okla. 156, 265 Pac. 1059 16

Winslow v. Baltimore & Ohio Railroad Company, 208 U.S. 59, 52 L.Ed. 388, 28 S.Ct. 190 13

INDEX CONTINUED

PAGE

Statutes:

11 O.S. 293 ____ 3, 13
11 O.S. 1961, 293 ____ 6
12 O.S. 1031, 1033 ____ 3

Textbooks:

16 Am.Jur.2d, Con. Law, Sec. 115 ____ 11
27 Am.Jur.2d, Eminent Domain, Sec. 468 ____ 13
30 C.J.S., Eminent Domain, Secs. 327(c), 328 ____ 6

APPENDIX

Appendix A:

Requested Findings of Fact and Conclusions of Law i-xi

Appendix B:

Oklahoma Statutes ____ xii-xiv

In the
Supreme Court of the United States
OCTOBER TERM, 1966

No. 367

G. C. COOPER, BERNARD COOPER, and
ELIZABETH MAULDING, NEE COOPER,
Petitioners,

VERSUS

THE CITY OF OKLAHOMA CITY, a Municipal Corporation,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The Findings of Fact, Conclusions of Law and Judgment of the Trial Court, the District Court of Oklahoma County, Oklahoma, are printed as Appendix A of the Petion and the Requested Findings of Fact and Conclusions of Law submitted by this Respondent to the Trial Court are set forth in Appendix A of this Brief in Opposition. The opinion of the Supreme Court of the State of Oklahoma entered January 25, 1966 is found in Volume 37, Oklahoma Bar Association Journal, pages 257-265 and Ap-

pendix B of the Petition. The Order of the Oklahoma Supreme Court dated March 22, 1966, amending its decision rendered January 25, 1966; is printed as Appendix C of the Petition.

JURISDICTION

This Court does not have jurisdiction since the Petitioners did not present a Federal question in their evidence in the Trial Court, nor in their Answer Brief in the Oklahoma Supreme Court, but presented a Federal question for the first time in their Petition for Rehearing to the Oklahoma Supreme Court. The Judgment of the Oklahoma Supreme Court is on independent, non-Federal grounds, sufficiently broad to sustain the decision.

QUESTIONS PRESENTED

1. Is the need for taking particular property the extent of taking and the compensation for the taking in a condemnation action to be judged by the conditions existing at the time of taking?

2. When condemnees accept the award of commissioners for their property condemned by a municipality, do they waive the objections to the taking?

3. When condemnees accept the award of commissioners or the jury verdict for damages to their property condemned by a municipality and do not appeal within the time provided by law, do the issues become *res judicata*?

4. Must the petition of a plaintiff seeking to vacate a condemnation proceeding tender a return of the commissioners' award to the condemnee?

5. Must a plaintiff in Oklahoma seeking to vacate a judgment alleging fraud verify his petition as required by 12 O.S. 1961, Section 1033?

6. May a petitioner that does not mention a Federal question in his brief to the Appellate Court raise a Federal question for the first time on Petition for Rehearing?

STATUTES INVOLVED

Oklahoma Statutes, Title 11, Section 293; Title 12, Sections 1031 and 1033 are set forth in Appendix B, Brief in Opposition.

STATEMENT

In this action the Petitioners seek to vacate the final adjudication of condemnation proceedings concerning a portion of the lands owned by them prior to the condemnation in 1941 for reservoir purposes by The City of Oklahoma City. The original action in condemnation was in the District Court of Oklahoma County, State of Oklahoma, Case No. 104206; from which case the Supreme Court of the State of Oklahoma has decided the cases of *Bush* v. *Oklahoma City*, 194 Okla. 504, 154 P.2d 960; *Nichols* v. *Oklahoma City*, 195 Okla. 305, 157 P.2d 174; *Haggard* v. *Oklahoma City*, 203 Okla. 76, 218 P.2d 366; and *Burke* v. *Oklahoma City*, Okla., 350 P.2d 264.

Petitioners filed this action to vacate and set aside the original judgment in the 1941 condemnation action. They alleged extrinsic fundamental fraud in the procurement of said judgment by the Respondent City. This allegation is based upon (1) a Resolution adopted March 22, 1960, by

the Council of The City of Oklahoma City, which declared the two tracts of real estate in the Lake Hefner area owned by the Respondent City to be surplus, not needed for reservoir or other purposes, and that said real estate should be sold; and (2) an "admission" in the testimony of V. V. Long given in the case of *Bush* v. *Oklahoma City, supra.*

The Respondent City resisted this action contending that Petitioners' Petition was fatally defective (1) since it did not contain a verification as required by Statute and failed to state a cause of action against the Respondent City and in favor of the Petitioners; (2) the issues were *res judicata,* having been litigated in 1942; (3) the acceptance of the award of the commissioners constituted a waiver of the Petitioners' rights to object to the taking of their lands in the condemnation proceedings; (4) that the land was needed in 1941 for reservoir purposes; (5) that no fraud of any type or kind was committed by the Respondent City against these Petitioners or the District Court of Oklahoma County, State of Oklahoma.

All the motions, objections and pleadings of the Respondent City were overruled by the Trial Judge, Glen O. Morris, and the case was thereafter tried to the Court without a jury. At the conclusion of the evidence both parties submitted Requested Findings of Fact and Conclusions of Law (Petitioners'—R. Vol. 1, pp. 370-381; Respondent's—R. Vol. 1, pp. 382-393). After having the case under advisement for over six months, the Trial Judge rendered Judgment for the Petitioners, adopting almost verbatim Petitioners' Requested Findings of Fact and Conclusions of Law. See Appendix A of the Petition for the Trial Court's decision.

After the Respondent City's Motion for a New Trial was overruled it appealed to the Oklahoma Supreme Court. In addition to its previous contentions, the Respondent City further contended (1) that the Trial Court erred in adopting Findings of Fact and Conclusions of Law which were contrary to the evidence, not supported by competent evidence, against the weight of the evidence and contrary to law; and (2) that the Trial Court erred in not adopting the Respondent City's Requested Findings of Fact and Conclusions of Law which were supported by competent evidence, the weight of the evidence and supported by law and cited authorities (Appendix A—Brief in Opposition); and (3) that the Trial Court should have rendered judgment for the Respondent City.

Thereafter on January 25, 1966 the Oklahoma Supreme Court, by unanimous decision, reversed the Order of the Trial Court and directed the Trial Court to vacate the Order overruling Respondent City's Motion for New Trial and the Judgment rendered in the Trial Court and further directed that the Trial Court enter Judgment for the Respondent City.

The Supreme Court of the State of Oklahoma, in reversing the Trial Court, found it unnecessary to discuss all the errors of law raised by the Respondent City. Justice Irwin's opinion reversing the Trial Court does not involve Federal questions but discusses two basic fundamental principles of law. First, the principle of *res judicata,* where Petitioners did not challenge the correctness of the proceedings by appeal but accepted and received damages in the amount determined by the commissioners or jury for his or her tract and later attempted to re-open the case,

citing *Henry* v. *United States*, 46 F.2d 640 and 30 C.J.S., Eminent Domain, Sections 327(c) and 328. Secondly, the other proposition in the opinion of Justice Irwin was that the Respondent City was required to prove only a reasonable necessity and not an absolute necessity for the taking of the lands in 1941, under the conditions existing in 1941, citing 11 O.S. 1961, Section 293, enacted in 1923 (App. B—Brief in Oppossition), and *Fischer* v. *Oklahoma City*, 198 Okla. 22, 174 P.2d 244, and that the necessity for taking was adequately proved by the testimony of registered professional engineers.

The Order of the Oklahoma Supreme Court entered March 22, 1966 (Appendix C to Petition) dealt with a procedural matter in Oklahoma Courts and is not raised nor discussed by the Petitioners in their Petition for Writ of Certiorari.

ARGUMENT

This case involves condemnation procedures in the State of Oklahoma and the doctrine of *res judicata*. In the Trial Court and on appeal to the Oklahoma Supreme Court the Petitioners relied exclusively on local law until the Oklahoma Supreme Court ruled adversely to their contentions and then on Petition for Rehearing the Petitioners tardily alleged a Federal question.

No Federal question is involved since there is no allegation that the provisions of the Oklahoma Constitution relating to condemnation actions are contrary to or in any manner contravene the United States Constitution. Petitioners were represented by counsel at all stages of the original condemnation proceedings, which began in 1941.

The issues pertaining to the necessity of the taking, extent of the taking, public use and compensation for the lands condemned by The City of Oklahoma City were all litigated, the decisions became final and Petitioners did not appeal.

Later, in 1960 Petitioners instituted this action seeking to overturn the existing Oklahoma law pertaining to condemnation and in total disregard of the principle of *res judicata.*

Although the Trial Court ruled in favor of Petitioners, the Oklahoma Supreme Court unanimously reversed the Trial Court and directed that Judgment be entered for the Respondent, The City of Oklahoma City, deciding the case entirely on local law and without reference to any Federal question. In its decision the Oklahoma Supreme Court found it unnecessary to consider all the allegations of error raised by the Respondent City and decided the case basically on the doctrine of *res judicata.*

The principles involved do not present any question for this Court.

I.

There Is No Important Question of Federal Law.

Petitioners in the Answer Brief before the Oklahoma Supreme Court urged provisions of the Oklahoma Constitution pertaining to condemnation of property; however, they did not contend that these provisions of the Oklahoma Constitution were contrary to or in conflict with similar provisions of the United States Constitution.

This case was litigated and decided entirely on local law, without reference to rights claimed under the Constitution of the United States.

Consolidated Turnpike Company v. *Norfolk & Ocean View Railway Company*, 228 U.S. 326, 57 L.Ed. 857, 33 S.Ct. 510:

> "1. The asserted right to just compensation for improvements in eminent domain proceedings does not necessarily present a question under U.S. Const., 14 Amend., so as to sustain a writ of error from the Federal Supreme Court to review a judgment of the highest court of a state, denying such right, where due process of law, including just compensation for property taken for public purposes, is guaranteed by the state laws and Constitution, and the case might well have been litigated wholly upon local law."

Southwestern Bell Telephone Company v. *State of Oklahoma*, 303 U.S. 206, 82 L.Ed. 751, 58 S.Ct. 528:

> "2. It is essential to the jurisdiction of the Supreme Court of the United States in reviewing a decision of a state court that it must appear affirmatively from the record not only that a Federal question was presented for decision to the highest court of the state having jurisdiction, but that its decision of the Federal question was necessary to the determination of the cause, that the Federal question was actually decided, or that the judgment as rendered could not have been given without deciding it."

Ward v. *Board of County Commissioners of Love County, Oklahoma*, 253 U.S. 17, 64 L.Ed. 751, 40 S.Ct. 419:

> "A judgment of a state court, which is put on independent nonfederal grounds broad enough to sustain it, cannot be reviewed when such grounds are not plainly untenable."

Hooker v. *City of Los Angeles*, 188 U.S. 314, 47 L.Ed. 487, 23 S.Ct. 395:

> "2. The construction by a state court of a law of the state as authorizing the court to try and determine in a condemnation proceeding an adverse claim of the plaintiff therein to an interest in the property sought to be condemned is conclusive on the Supreme Court of the United States on writ of error to that court.
>
> "3. A decision of a state court in condemnation proceedings is not reviewable in the Supreme Court of the United States on the theory that due process of law was denied thereby, or property taken without just compensation, where there is nothing in the record which adequately shows that the state court was led to suppose that any claim was made under the Constitution of the United States, or that any ruling involved a decision against a right set up under that instrument."

The Oklahoma Supreme Court decided this case on independent non-federal grounds which are sufficiently broad to sustain the decision.

II.

Petitioners Have Waived Their Right to Urge a Federal Question.

In the Trial Court the Petitioners presented their case on the theory of extrinsic constructive fraud. The Amended Petition (R. Vol. 1, p. 35), mentions the United States Constitution without specific reference to any Article or Section. At the conclusion of the trial, both parties submitted Requested Findings of Fact and Conclusions of Law; Petitioners' (R. Vol. 1, pp. 370-381) and Respondent's in Appendix A, Brief in Opposition and (R. Vol. 1, pp. 382-393).

The Requested Findings of Fact and Conclusions of Law submitted by Petitioners did not include any Federal question. Likewise, the Trial Court's Findings of Fact and Conclusions of Law (R. Vol. 1, pp. 396-411; Appendix A of Petition) did not decide a Federal question but decided the case on the theory of extrinsic constructive fraud.

In their Answer Brief in the Oklahoma Supreme Court (See Answer Brief Index i-iii) the Petitioners relied on the Oklahoma Constitution and not on any Federal question or the United States Constitution.

Consolidated Turnpike Company v. *Norfolk & Ocean View Railway,* 228 U.S. 326, 57 L.Ed. 857, 33 S.Ct. 510, at page 512 of the Supreme Court Reporter, the United States Court holds:

> "If a case is carried through the state courts upon arguments drawn from the state Constitution alone, the defeated party cannot try his chances here merely by suggesting for the first time when he takes his writ of error that the decision is wrong under the Constitution of the United States. Crowell v. Randell, 10 Pet. 368, 398, 9 L.ed. 458, 470; Simmerman v. Nebraska, 116 U.S. 54, 29 L.ed. 535, 6 Sup.Ct.Rep. 1186; Erie R. Co. v. Purdy, 185 U.S. 148, 153, 46 L.ed. 847, 850, 22 Sup. Ct. Rep. 605."

Beck v. *Washington,* 369 U.S. 541, 8 L.Ed.2d 98, 82 S.Ct. 955:

> "12. The Supreme Court of the United States cannot entertain a question not raised in the state court below nor actually decided by that court."

16 Am.Jur.2d, Con. Law, Section 115, states in part: -

"* * * An appellant who fails to argue a constitutional contention in his brief, merely setting it forth in one sentence, is considered to have abandoned or waived such contention. * * *"

The opinion of Justice Irwin for the Oklahoma Supreme Court, as amended (Appendix B and C of Petition), decided the case on adequate non-Federal grounds; namely, *res judicata* and that the Respondent City had proved a reasonable necessity for the taking of the land. The first discussion by Petitioners of the United States Constitution or a Federal question was in their Petition for Rehearing and Brief in Support thereof.

St. Louis & San Francisco Railroad Company v. *Shepherd*, 40 Okla. 589, 139 Pac. 833, on appeal, 240 U.S. 240, 60 L.Ed. 622, 36 S.Ct. 274, holds:

"1. A Federal question first set up and asserted in a petition for rehearing after the judgment in the trial court had been affirmed by the highest court of the state will not support the jurisdiction of the Federal Supreme Court on writ of error, where the petition was not entertained, but was denied, without passing on the Federal question thus tardily raised."

Bilby v. *Stewart*, 55 Okla. 767, 153 Pac. 1173, on appeal, 246 U.S. 255, 62 L.Ed. 701, 38 S.Ct. 264, states:

"Where plaintiffs in error did not raise any federal question until their second petition for rehearing, after the state Supreme Court had affirmed a judgment on an adequate nonfederal ground, the question was raised too late for consideration on writ of error sued out from the United States Supreme Court."

The Oklahoma Supreme Court denied the Petition for Rehearing without deciding the tardily alleged Federal questions. See Orders of the Oklahoma Supreme Court dated March 22, 1966 denying the Petition for Rehearing and amending its decision rendered on January 25, 1966 and Order dated April 19, 1966, denying the Second Petition for Rehearing; therefore, Petitioners are precluded from urging a Federal question.

III.

The Decision Is Clearly Correct.

The Oklahoma Supreme Court thoroughly searched the record and at 37 O.B.A.J. 260 (Appendix B, p. A 22, Petition) stated:

> "The original condemnation proceedings were commenced on July 24, 1941, and the record discloses that on August 26, 1941, each of the plaintiffs herein filed an answer specifically denying that it was necessary for City to take and appropriate his or her particular tract for reservoir purposes. On October 9, 1941, the Commissioners filed their report of their report of their appraisal and on October 17, 1941, each of plaintiffs filed a demand for a jury trial. Without setting forth other details of the proceedings, it is sufficient to say that each plaintiff did not challenge the correctness of the proceedings by appeal but accepted and received damages in the amount determined by the Commissioners or the jury for his or her separate tract."

Pleadings in the original condemnation, including Answer of the three Petitioners (R. Vol. 2, pp. 120-135), their three Demands and two Withdrawals of Demands for Jury Trial (R. Vol. 2, pp. 136-146), Applications and Orders for payment of compensation awarded by commissioners

(R. Vol. 2, pp. 154-170), and the Journal Entries of Judgment (R. Vol. 2, pp. 180-189) clearly reveal that all issues, including the issue of necessity, were litigated.

27 Am.Jur.2d, Eminent Domain, Section 468, provides in part:

> "* * * The rule that a party who has voluntarily accepted the benefits of a judgment order, or decree cannot thereafter institute appeal or error proceedings to reverse it, in general applies in appeals from condemnation proceedings both as to the condemnor and the landowner. * * *"

Winslow v. *Baltimore & Ohio Railroad Company,* 208 U.S. 59, 52 L.Ed. 388, 28 S.Ct. 190:

> "1. By accepting the sum awarded in condemnation proceedings as the value of that portion of their lands actually taken, the owners are estopped to insist that the petition was not maintainable."

Henry v. *United States,* 46 F.2d 640:

> "Property owner accepting award for taking property under eminent domain cannot raise question of validity of proceedings or taking."

The 1941 Resolution of Necessity (R. Vol. 2, pp. 74-83), pursuant to Statute, 11 O.S. 293 (App. B—Brief in Opposition) included Petitioners' lands and this Resolution of Necessity was approved by the Oklahoma Supreme Court in *Bush* v. *Oklahoma City,* 194 Okla. 504, 154 P.2d 960. Instructions of the Trial Court in 1942 (R. Vol. 2, pp. 171-172), Order of the Trial Court (R. Vol. 2, p. 184), and Journal Entry of Judgment (R. Vol. 2, pp. 187-189), reveal that The City of Oklahoma City proved necessity and was entitled to the fee simple title to the lands.

The necessity of the taking of these lands by The City of Oklahoma City was again proved in the 1962 testimony of Frank Herrman (R. Vol. 1, pp. 248-263), Frank S. Taylor (R. Vol. 1, pp. 263-276), and S. Karl Bean (R. Vol. 1, pp. 289-324), all registered professional engineers. These witnesses also testified concerning the construction of a sanitary diversion ditch around the south shore of Lake Hefner to divert the polluted waters draining from the south (including the former lands of the Petitioners) around the lake. This project, requested by the Health Department of the State of Oklahoma, was commenced by the Respondent City in 1957 and completed in 1959. The completion of this project changed the high-water line and the 660-foot line which had existed since 1941.

Petitioners presented no expert testimony that these lands were not necessary for the uses and purposes for which condemned.

Thus, the issues were litigated, not appealed, and became *res judicata*. The Oklahoma Supreme Court (37 O.B.A.J. 260, Appendix B, p. A 233, Petition) in its opinion stated:

> "The principle of res judicata is applicable in condemnation cases. In accordance with the principles governing the doctrine of res judicata with respect to judgments generally, * * * where an award or judgment is regularly made, and, as held by some authorities, is not appealed from, the rights of the respective parties become definitely fixed thereby, and it is conclusively binding on all the parties of record and likewise, on their privies and grantees. * * *"

IV.

There Is No Conflict of Decision.

On page 17 of the Petition the proposition is urged that the holding of the Oklahoma Supreme Court in the instant case is in conflict with cases of this Court in which certiorari has been granted to review actions by former landowners seeking to vacate condemnation actions, citing *Huling* v. *Kaw Valley Railway & Improvement Company,* 130 U.S. 559, 32 L.Ed. 1045, 9 S.Ct. 603, and *Goodrich* v. *Detroit,* 184 U.S. 432, 46 L.Ed. 627, 22 S.Ct. 397.

Clearly these cases are distinguishable. In *Huling* v. *Kaw Valley Railway & Improvement Company, supra,* the issue involved was, did notice by publication to a non-resident property owner comply with the requirements of due process of law; while *Goodrich* v. *Detroit, supra,* was not a condemnation action but a suit to enjoin collection of assessments for benefits from a street improvement.

Two other cases cited by Petitioners, *Escobedo* v. *Illinois* (erroneously cited as *Escobedo* v. *United States*), 378 U.S. 478, 12 L.Ed.2d 977, 84 S.Ct. 1758, and *Shepperd* v. *Maxwell,* — U.S. —, 16 L.Ed.2d 600, 86 S.Ct. —, both involved constitutional rights of citizens charged and subsequently convicted of crimes and relate in no possible way to the rights of these Petitioners.

Several cases are cited by Petitioners stating that the nature of use in a condemnation action is a judicial question. The necessity and extent of taking the land involved herein, for the uses and purposes set forth in the Resolution of Necessity (R. Vol. 2, pp. 74-83), was litigated and decided in favor of the Respondent City in the early 1940's,

and re-affirmed by the Oklahoma Supreme Court in its opinion dated January 25, 1966 and published as Appendix B of the Petition. This decision re-affirmed previous decisions and law in the State of Oklahoma pertaining to condemnation, namely: *Fischer* v. *Oklahoma City,* 198 Okla. 22, 174 P.2d 244, and *Graham* v. *City of Duncan,* Okla., 354 P.2d 458:

> "The need for taking the particular property and the extent of the taking are to be judged by the conditions existing at the time of taking."

White v. *City of Pawhuska,* 130 Okla. 156, 265 Pac. 1059:

> "The word 'necessity' in connection with condemnation proceedings does not mean an absolute but only a reasonable necessity, such as would combine the greatest benefit to the public with the least inconvenience and expenses to the condemning party and property owners consistent with such benefit."

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JAMES G. HAMILL
309 Municipal Building
Oklahoma City, Oklahoma 73102
Counsel for Respondent

September, 1966

APPENDIX A

IN THE DISTRICT COURT OF OKLAHOMA COUNTY,
STATE OF OKLAHOMA.

G. C. Cooper, et al, Plaintiffs,	)	
vs.	)	No. 149,524
The City of Oklahoma City, a municipal corporation, Defendant.	)	

REGUESTED FINIDNGS OF FACT AND CONCLUSIONS OF LAW OF THE DEFENDANT

Comes now the above named defendant and moves the Court to make the following Findings of Fact and Conclusions of law herein.

ROY H. SEMTNER
Municipal Counselor
By /s/ Charles E. Chilton
Charles E. Chilton
/s/ James G. Hamill
James G. Hamill

Assistant Municipal Counselors
Attorneys for Defendant
The City of Oklahoma City

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court makes the following Findings of Facts herein.

1.

That on July 15, 1941 the City Council of Oklahoma City adopted a resolution declaring the necessity for acquiring, owning, improving, maintaining and beautifying

certain real property for reservoir purposes; instructing the City Manager to acquire fee simple title thereto under the power of eminent domain, said resolution pertaining to and including real estate of the plaintiffs herein, further identified as Tracts 8, 9, and 12.

2.

That on July 24, 1941 the City of Oklahoma City, by and through its Municipal Counselor, filed a petition in the District Court of Oklahoma County, Case No. 104026, entitled "The City of Oklahoma City vs. Mevon Corporation, et al.," to acquire by eminent domain a fee simple title in the real property described in the resolution of July 15, 1941.

3.

That on August 20, 1941 the Court appointed commissioners to appraise the lands involved in Case No. 104,026, including real estate owned by the plaintiffs herein.

4.

That on August 26, 1941, the plaintiffs herein, and each of them, filed their answers to the petition in Case No. 104,026. A true copy of the answer of Bernard Cooper is attached herewith, marked "Attachment A." The answers of Green C. Cooper and Elizabeth Maulding, nee Cooper, contained the identical allegations of the answer of Bernard Coopers; namely, denying that their real estate was needed by the City for the construction of a water reservoir.

5.

That on October 9, 1941 the commisisoners filed their report including appraisals of the real estate owned by the plaintiffs herein, said report being as follows:

Green C. Cooper	Tract. No. 8	$7,000.00
Bernard Cooper	Tract No. 9	$5,500.00
Elizabeth Maulding, nee Cooper	Tract No. 12	$2,641.00

6.

That on October 17, 1941 plaintiffs herein filed their demand for a jury trial for assessment of damages.

7.

That on November 8, 1941 The City of Oklahoma City filed a demand for jury trial for assessment of damages to Tracts 8, 9 and 12 owned by plaintiffs herein.

8.

That on January 16, 1942 Green C. Cooper applied to the Court for payment of compensation awarded by commissioners on Tract 8.

9.

That on January 26, 1942 the Court entered an order to pay compensation awarded by commissioners to Green C. Cooper in the amount of $5,455.00 and to J. D. Thompson, lienholder $1,545.00 pursuant to the application of Green C. Cooper and that said amounts were paid by the City and received by the parties.

10.

That on March 9, 1942 Bernard Cooper and Elizabeth Maulding, nee Cooper, applied to the Court for payment of compensation awarded by commissioners; said applications being approved by the Court on March 9, 1942; order of the Court entered therein for payment of compensation awarded by commissioners to Bernard Cooper in the amount of $5,052.26 and lienholder M. D. Cochran $447.74 for Tract No. 9; and to Elizabeth Maulding, nee Cooper, $2,193.26 and lienholder M. D. Cochran $447.74 for Tract No. 12, said sums being paid by the City and received by the aforementioned parties.

11.

(a) That on October 5, 1942 the case of Green C. Cooper (Tract 8) was tried to a jury.

(b) That the Court instructed the jury that The City of Oklahoma City would receive a fee simple title to said tract, Instruction No. 1, given by District Judge Lucius Babcock, reads, in part, as follows:

"GENTLEMEN OF THE JURY:

"1st This is an action resulting from a proceeding brought in this court in which the City of Oklahoma City, a Municipal Corporation, has condemned a certain tract of land for the purpose of constructing a water reservoir thereon and it appears that the proceeding has extended to the point where the land has been condemned and the project located upon the lands of Green C. Cooper, he being the party having demanded a jury trial, and it is now your duty to determine the fair, cash market value of the fee simple title to the tract of land involved which value is to be determined as of October 14, 1941, Said tract of land is described as follows:"

(c) That the jury awarded the sum of $5,650.00 to Green C. Cooper, which was $1,350.00 less than the commissioners' award on Tract 8, and withdrawn by said Green C. Cooper pursuant to the order of the Court rendered on January 26, 1942. A true copy of the Journal Entry pertaining to Tract 8 is herewith attached, marked "Attachment B."

(d) That on October 7, 1942, a motion for new trial was filed by Green C. Cooper; said motion was overruled on November 6, 1942 and no appeal was taken from the ruling of the Court.

12.

That on October 12, 1942 Elizabeth Maulding, nee Cooper (Tract 12), and The City of Oklahoma City both withdrew their demands for a trial by jury; the District Court approved the award of commissioners and ordered that said award be sustained as the final judgment insofar as Tract 12 was concerned and no appeal was taken therefrom by either party. A true copy of said order is herewith attached, marked "Attachment C."

13.

That on October 25, 1946 the City withdrew its demand for a jury trial on Tract 9 and Bernard Cooper withdrew his demand for a jury trial on the aforementioned Tract on October 28, 1946.

14.

That on November 12, 1946 the District Court found that Bernard Cooper had withdrawn his objections to the report of the commissioners; that the taking and condemnation of Tract 9 was necessary; report of commissioners confirmed and fee simple absolute title vested in The City of Oklahoma City. No appeal was taken therefrom by either party. A true copy of the Journal Entry is herewith attached, marked "Attachment D."

15.

That the overwhelming majority, if not all, of Tracts 8, 9, and 12, and each of them, and more specifically the 24.61 acres, more or less, in litigation herein, were within 660 feet of the high water mark of the proposed Bluff Creek Reservoir when condemnation proceedings were instituted in 1941.

16.

That the issue of necessity of the taking by condemnation by The City of Oklahoma City of Tracts 8, 9 and 12

was presented to the District Court of Oklahoma County, and said issue was found in favor of The City of Oklahoma City. No appeal therefrom was taken by the condemnees.

17.

(a) That in 1941 The City of Oklahoma City, by and through its agents, servants and employees, entered into visible, open, continuous and exclusive possession of Tracts 8, 9 and 12 with a claim of ownership in fee simple.

(b) That since entering into possession in 1941, Tracts 8, 9 and 12 have been used by The City of Oklahoma City for public purposes in connection with the Bluff Creek Reservoir, now known as Lake Hefner.

(c) That The City of Oklahoma City has remained in visible, open, continuous and exclusive possesison with a claim of ownership in fee simple in Tracts 8, 9 and 12 from 1941 through the present time.

18.

That the plaintiffs in this action, Green C. Cooper, Bernard Cooper and Elizabeth Maulding, nee Cooper, former owners of Tracts 8, 9 and 12, and The City of Oklahoma City were adversary litigants in District Court of Oklahoma County, Case No. 104,026, involving condemnation by The City of Oklahoma City of the aforementioned tracts.

19.

That plaintiffs herein, Bernard C. Cooper and Elizabeth Maulding, nee Cooper claimed that in 1941 they knew their real estate, Tracts 9 and 12, were not needed and would never be used for reservoir purposes by The City of Oklahoma City.

20.

That the City Council of The City of Oklahoma City in 1941 was presented engineering reports, maps, charts and other technical information showing a necessity for the acquiring of Tracts 8, 9 and 12 for reservoir purposes prior to the enactment of the resolution of necessity on July 15, 1941.

21.

That the plaintiffs herein, Green C. Cooper, Bernard Cooper and Elizabeth Maulding, nee Cooper, have offered no evidence showing, tending to show, or inferring fraud of any kind or nature committed by any City Councilman of The City of Oklahoma City, or any other employee or agent of Oklahoma City, against the plaintiffs herein or the Court.

22.

That the allegations of the petition of the plaintiffs herein did not contain a tender to return the purchase price, or proportionate share thereof, paid by The City of Oklahoma City to the plaintiffs herein in 1942 for Tracts 8, 9 and 12, and said petition did not contain a verification by the plaintiffs or their attorneys.

CONCLUSIONS OF LAW

1.

The adoption of the resolution of necessity by the Oklahoma City Council on July 15, 1941 was a legislative act. *City of Tulsa* v. *Williams,* 227 P. 876, *Grand River Dam Authority* v. *Thompson,* 113 P.2d 818, syllabus 2.

2.

The introduction in evidence of the resolution of necessity by the Municipal Authority established a prima

facie case of necessity, whereupon the burden to proceed with evidence shifted to the condemnees. *Bush* v. *Oklahoma City,* 154 P.2d 960, Syllabus 1; *Delfeld* v. *City of Tulsa,* 131 P.2d 754.

3.

When the condemnees withdrew their objections to the taking and joined issue on the value of the fee simple title sought, condemnees waived objections and cannot thereafter raise any issue in an effort to recover the real estate. *Winslow* v. *Baltimore & Ohio Railroad,* 208 U.S. 59, *Fischer* v. *Oklahoma City,* 174 P.2d 244, syllabus 3; *Seba* v. *Independent School District No. 3,* 253 P.2d 559; *Henry* v. *U. S.,* 46 F.2d 640.

4.

It is within the proper province of the legislature to enact laws which will enable municipalities to acquire a fee simple title in real estate by exercising the power of eminent domain. *Ramsey* v. *Leeper,* 31 P.2d 852, syllabus 3.

5.

Where title of legislative act, House Bill No. 309, Session Laws 1923 (11 O.S. 1961, Sec. 293), states its purpose as authorizing municipal corporations "to purchase or condemn and hold lots and lands in fee simple for waterworks purposes," language in body of act authorizing any municipal corporation "to purchase or condemn and hold the perpetual right to use any lots or lands" for such purposes authorizes and imports the condemnation of the fee simple title to such lands. *Springfield* v. *City of Perry,* 358 P.2d 846, syllabus 3.

6.

The need for taking the particular property and the extent of the taking and the compensation for the taking

are to be judged by the conditions existing at the time of taking. *Fischer* v. *Okla. City*, [illegible].2d 244; *Graham* v. *City of Duncan*, 354 P.2d 458.

7.

The necessity, utility or expediency of the exercise of the right of eminent domain are questions for legislative determination, and the Courts have no power to interfere with the reasonable exercise thereof; but when the question is raised as to the necessity for taking any particular piece of property for the public use, such question presents matter for judicial determination, *Grand River Dam Authority* v. *Thompson*, 113 P.2d 818, syllabus 3.

8.

A municipality condemning land for reservoir purposes under the authority of 11 O.S. 1961, Sec. 293 is not required to show an aboslute necessity, but only a reasonable present necessity for the taking of particular land, *Bush* v. *Oklahoma City*, 154 P.2d 960.

9.

The issue of necessity was raised by the condemnees and determined in favor of the condemnor, The City of Oklahoma City in Case No. 104,026, District Court of Oklahoma County.

10.

When the condemnees failed to appeal within the time allowed by statute, the determination of the issue of necessity and the judgment in favor of The City of Oklahoma City became conclusive, not only as to all the matters litigated and determined, but also as to all matters germane to the issue which could or might have been litigated herein. *Pruitt* v. *Hammers*, 292 P.2d 157, syllabus 3.

11.

The City of Oklahoma City has been in possession of Tracts 8, 9 and 12 for sufficient length of time to acquire title by prescription under the authority of 12 O.S. 1961, Sec. 93, paragraph 4.

12.

There is no evidence of any type of fraud committed by the City Council of Oklahoma City in 1941, 1960 or 1962, or by any agent or employee of said City, against the Court of plaintiffs herein.

13.

The petition of the plaintiffs herein is fatally defective since its allegations did not contain a tender to return to The City of Oklahoma City the purchase price, or proportionate share thereof, paid by The City of Oklahoma City in 1942 to plaintiffs herein for Tracts 8, 9 and 12 and for the further reason that plaintiffs' petition was not verified, as required by law. *Henry* v. *United States,* 46 F.2d 640; *Scott* v. *Bailey,* 169 P.2d 208; *Allan* v. *Garson,* 189 P. 183, 12 O.S. 1961, Sections 1031, subd. 4, 1033.

Judge of the District Court

(Attached to the foregoing Suggested Findings of fact and Conclusions of Law, as "Attachment A" thereof, appears the "Answer of the Defendant Bernard Cooper" filed in case No. 104026, which is set out at page numbered 129 in the volume of this case-made labeled "EXHIBITS" and for that reason is not recopied here.)

(Also attached to said instrument as "Attachment B" thereof, is a JOURNAL ENTRY OF JUDGMENT in case No. 104026, which is set out at page numbered 180 of the "EXHIBITS" volume of this case-made and for that reason is not recopied here.)

(Also attached to said instrument as "Attachment C" thereof, is an "ORDER," filed in said case No. 104026, which is set out in the "EXHIBITS" volume of this case-made at page numbered 184 thereof, and for that reason is not recopied here.)

(Also attached to said instrument as "Attachment D" thereof, is a "JOURNAL ENTRY," filed in case No. 104026, which is set out in the "EXHIBITS" volume of this case-made at page numbered 187 thereof, and for that reason is not recopied here.)

APPENDIX B

OKLAHOMA STATUTES, 1961, Title 11, Section 293:

§ 293. Purchase or condemnation of land for waterworks—Protection from contamination or pollution.—Any municipal corporation within this State, may purchase or condemn and hold the perpetual right to use any lots or lands, either within or without the corporate limits of such municipal corporation, which the governing body of such municipal corporation shall determine by resolution to be necessary to be acquired by such municipal corporation for the location and building or enlargment at the time or in the future, of waterworks plant or plants, and every auxiliary part thereof, including reservoir site or sites to be flooded, and the lands adjacent thereto, and within six hundred and sixty feet of the margin of said reservoir at maximum high water; and also any lands which the governing body of such municipal corporation shall, by resolution, determine to be necessary to be acquired for the purpose of protecting any reservoir already constructed, or proposed to be constructed or enlarged, as a part of any such municpal waterworks plant or water supply, and the waters thereof, and the waters flowing therein or percolating or seeping thereto from possible contamination or pollution and policing the same; and such municipal corporation is hereby invested with the power of eminent domain for the purpose of acquiring any such lands; and the proceedings for the condemnation thereof, including the notices, appointment of commissioners, assessment of damages, possession, payment of compensation and appeals, shall be the same as is provided by law for the condemnation of lands for railroad purposes, provided, however, it shall not be necessary in proceedings to condemn, under this Act,[1] to allege or prove any negotiations for the purchase of any lands or interests therein, with the owner or owners or claimants of any property sought to be condemned, where such ownership does not appear clearly from the title records in the office of the

County Clerk of the County where such lots or lands are situate, or where the present owners are heirs of the person or persons who appear from such records to be the owner or owners, or hold or claim under such heirs, and the lands have not been partitioned, at the time the petion to condemn is filed; and provided, further, the notice of application for appointment of commisisoners to assess damages in condemnation proceedings may, in all cases mentioned in the first proviso hereof, be given by publication, as provided by law for notice to non-residents, in the law regulating the condemnation of lands for railroad purposes. That the property and land acquired as herein provided, and all lands previously acquired and hereafter acquired, insofar as the same are within Six Hundred Sixty (660) feet of the margin of such reservoir, at maximum high water, except such or any part of such lands, the natural drainage of which is not into such reservoir, shall not be used by such municipal corporation, its lessees or assigns, or other persons or corporation, for any purpose other than the protection of such reservoir, and the waters thereof, from contamination and pollution, and no structure shall be placed thereon by any such municipality, individual or corporation, except such as are necessary in the furtherance of the protection of such reservoir from contamination or pollution, and in the use of such water. This Act shall be construed as cumulative to the rights and powers already possessed by municipal corporations to purchase, take and condemn land for public uses. Laws 1923, ch. 204, p. 355, § 1.

TITLE 12, SECTION 1031

§ 1031. District court, power to vacate or modify its judgments, when.—The district court shall have power to vacate or modify its own judgments or orders, at or after the term at which such judgment or order was made:

First. By granting a new trial for the cause within the time and in the manner prescribed in Section 5035.[1]

Second. By a new trial granted in proceedings against defendants constructively summoned, as provided in Section 4728.[2]

Third. For mistake, neglect or omisison of the clerk, or irregularity in obtaining a judgment or order.

Fourth. For fraud, practiced by the successful party, in obtaining the judgment or order.

Fifth. For erroneous proceedings against an infant, or a person of unsound mind, where the condition of such defendant does not appear in the record, nor the error in the proceedings.

Sixth. For the death of one of the parties before the judgment in the action.

Seventh. For unavoidable casualty or misfortune, preventing the party from prosecuting or defending.

Eighth. For errors in a judgment, shown by an infant in twelve months after arriving at full age, as prescribed in Section 5142.[3]

Ninth. For taking judgments upon warrants of attorney for more than was due to the plaintiff, when the defendant was not summoned or otherwise legally notified of the time and place of taking such judgment. R.L. 1910, § 5267.

TITLE 12, SECTION 1033

§ 1033. Proceedings by petition, when—Summons.—The proceedings to vacate or modify the judgment or order, on the grounds mentioned in subdivisions four, five, six, seven, eight and nine of the second preceding section,[1] shall be by petition, verified by affidavit, setting forth the judgment or order, the grounds to vacate or modify it, and the defense to the action, if the party applying was defendant. On such petition, a summons shall issue and be served as in the commencement of an action. R.L. 1910, § 5269.